IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 3969 OF 2005.

Jaysingrao Dhondiram Kadam. ... Applicant.

Versus.

Faruk Nijamuddin Momin and another. ... Respondents.

Shri S.S.Kulkarni for the Applicant.

Shri S.V.Kotwal for the Respondent No.1.

Shri A.S.Shitole, A.P.P. for the State.

CORAM : ABHAY S.OKA, J.

DATED : 20th December, 2006.

P.C.:

1. Heard the learned Advocates for the Applicant and the Respondent No.1. The Applicant is the complainant in a complaint filed under section 138 of the Negotiable Instruments Act, 1881 read with section 420 of the Indian Penal Code. Process was issued by the learned Magistrate for an offence under section 138 of the Negotiable Instruments Act. I have perused a copy of the complaint, copies of notes of evidence and copies of the exhibited documents on record of the trial Court. The learned Magistrate has passed an order of acquittal.

2. The case of the complainant is that the 1st Respondent was his friend and friendly loans were advanced by him from time to time to the 1st Respondent. According to him on 13th September 2002, a promissory note was executed by the 1st Respondent in favour of the

Applicant and thereafter on 3rd October 2002 a cheque in the sum of Rs.4,41,321/- was issued by the 1st Respondent in favour of the Applicant. The said cheque was dishonoured and on the basis of the said cheque, a complaint was filed.

3. The learned Advocate for the Applicant criticised the finding of the learned trial Judge in paragraph 7 of the impugned judgment. He pointed out that the learned Judge has completely ignored the fact that the promissory note was executed by the 1st Respondent on 13th September 2002 which was duly proved before the Court and for the amount mentioned in the promissory note, a cheque was issued subsequently on 3rd October 2002. He submitted that the Applicant being an agriculturist was not liable to pay income tax. He pointed out the written say filed by the 1st Respondent. He pointed out that it was sought to be contended by the 1st Respondent that the Applicant was unable to recover the amount of interest from one Haridas Dhane and one Sunil Pol and as he was witness to the transaction between the Applicant and the said two persons, the Applicant assaulted him and obtained his signatures on blank papers. He submitted that the said version is completely wrong as is evidenced by Index II of the Deed of Re-conveyance executed by the said Shri Pol and Shri Dhane in favour of the Applicant. He submitted that in

view of section 139 of the Negotiable Instruments Act, 1881 and in view of the fact that the promissory note was duly proved before the Court, the entire burden was on the 1st Respondent. He submitted that he has not discharged the said burden and therefore, the learned Judge has committed an error by dismissing the complaint.

4. I have carefully considered the submissions. In the cross-examination, the Applicant stated that he advanced some money to the 1st Respondent prior to the year 2000. He admitted that he was unable to state the exact date and the amount paid by him to the 1st Respondent from time to time by way of hand loan. He admitted that he has not maintained any record of making payment to the accused. It will also be necessary to refer to the further cross-examination of the Applicant. In paragraph 8 of the cross-examination, the Applicant has stated as under:

> "I had paid money to the accused, out of my agricultural income received by me by way of sugarcane bills from Sayadri Sugar Factory. I can produce my bank pass-book to show that sugarcane bills were credited in my saving account. I have spend money for construction of my bungalow as well as for marriage of my

daughter in the year 2000."

In paragraph 6, the Applicant has admitted that he was not a tax payer. There is nothing on record to show that the pass-book was produced by the Applicant to show that sugarcane bills were credited to his saving account.

5. It is well settled position of law that for rebutting presumption under section 139 of the said Act of 1881, it is not necessary for the accused in every case to enter the witness box. The presumption can be shown to be rebutted by preponderance of probabilities.

6. In paragraph 7 of the impugned order, the learned Judge has held thus:

> "7. Complainant Jaising says that accused had obtained handloan of Rs.4,41,321/- from time to time. The cross examination of Jaysing makes it clear that the transaction of this huge amount is unaccounted. Not a single piece of paper is placed by Jaising to show that he had maintained accounts of this huge transaction. Second aspect relates to accounting of this huge amount. Jaysing is not in position to show the source of this

> huge money, when he is found to be an agriculturist. When asked during cross examination, he is not in a position to place at least his pass book of his account which would highlight his financial status. The dobt in question thus remained unaccounted."

If the admissions which are referred to above in the deposition of the Applicant are considered, it is obvious that the finding recorded by the learned trial Judge in paragraph 7 is certainly a possible finding which could have been recorded on the basis of the evidence on record.

7. Even assuming that the promissory note was duly proved, in view of the finding recorded in paragraph 7 by the learned trial Judge, it cannot be said that the liability was a legally recoverable liability.

8. Assuming that what is stated by the Advocate for the Applicant is correct, at the highest it can be said that another view can possibly be taken on the basis of the evidence on record. However, that is not a ground to interfere with the order of acquittal as the view taken by the trial Court is also a possible view.

9. The learned Advocate for the Applicant submitted

that the finding recorded in paragraph 7 by the learned trial Judge is perverse as it was not the case of the 1st Respondent that the amount advanced to him was unaccounted money. The case of the 1st Respondent is of denial and the finding recorded in paragraph 7 is on the basis of the statements made by the Applicant himself in his cross-examination and therefore, the said finding obviously cannot be said to be perverse.

10. In view of the above, no case is made out for grant of leave to prefer Appeal. The Application is rejected.

Judge.